Supreme Court of the United States.

October Term, 1888.

SAMUEL WELSON,

Plaintiff in Error,

vs.

DENNIS MOLONEY,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

ALBERT J. ADAMS,

Attorney for Plaintiff in Error.

THE H. REYNAR,

Of Counsel.

IN THE

Supreme Court of the United States.

SAMUEL NELSON,
Plaintiff in error,

against

DENNIS MOLONEY,
Defendant in error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This is a motion to dismiss the writ of error allowed by Mr. Justice Peckham, to review the judgment entered in this action on the 6th day of March, 1899, in the office of the Supreme Court of the State of New York ; and also to review the jurisdiction of the State Court to try this action on the ground that the cause had been removed from the State Court to the Circuit Court of the United States, prior to the filing of the answer, and also to review, if permissible, the order of the Circuit Court Judge in remanding the cause back to the State Court.

Prior to the commencement of this action the

plaintiff in error, who had been a resident and citizen of the State of New York, changed his residence and citizenship to the State of New Jersey.

See papers on Removal.

After the complaint was served the plaintiff in error filed his petition, accompanied by a bond, in the State Court which were approved and allowed by a Justice of the Supreme Court ; subsequently, after the removal of the cause to the Circuit Court of the United States, the defendant, Samuel Nelson served and filed his answer in the Circuit Court of the United States.

See Record, p. 10.

At the same time the defendant Albert J. Adams, served and filed his separate answer in the Circuit Court of the United States, in which he sets out that in the month of November, 1891, he purchased of said defendant, Samuel Nelson, the property described in the complaint, being the property in question ; that he subsequently discovered that there was a *lis pendens* filed that affected said premises, and that he thereupon executed and delivered a deed thereon at the request of the plaintiff in error to a person by the name of Mead, full name the defendant does not recollect, and also that this defendant has no interest in the property referred to in this action.

Nelson's answer was verified April 1st, 1895 ; answer of Adams was verified on the 30th day of March, 1895.

On the 2d day of May, 1895, the defendant Adams and wife, executed and delivered to one Isabella Mead another deed for the same premises, for the reason that the first deed had been

mislaid or lost and not recorded, for the purpose of perpetuating the deed first given, which deed was duly recorded in the office of the Register of the City and County of New York on May 3d, 1895.

See Record, folios 268-275.

Immediately after the order of remand was made the plaintiff in error applied to said Circuit Court Justice for an allowance of appeal to the Supreme Court, from the order entered remanding the cause, which said Judge declined to allow in the memorandum as follows: "No appeal from order remanding can be allowed; Sec. 2, Act of 1897. E. H. L."

By leave of Justice Lacomb the counsel for the plaintiff in error applied to the Justice of the Supreme Court, assigned to this circuit for an allowance of appeal, but said Justice declined to allow the appeal upon the ground that no appeal could be taken until after final judgment in the action.

ARGUMENT.

Point I.

The filing of the petition and bond, as required by the United States statute, in the State Court, and the allowance of the same, divested the State Court of all jurisdiction in the case, and the jurisdiction was transferred to the Circuit Court of the United States. This proposition has been so often decided and enunciated in the Supreme Court that

it is hardly necesssary to cite any decisions to that effect.

100 U. S., 375.
Insurance Co. *vs.* Dunn, 19 Wall., 214.
R. R. Co. *vs.* Koontz, 104 U. S., 14.

This case announced that it is a well-settled rule of decision in this Court that when a sufficient case for removal is made in a State Court, the rightful jurisdiction of that Court comes to an end, and no further proceedings can be properly had there, unless in some form its jurisdiction is restored.

The remanding of the case back to the State Court was error.

Memorandum of Judge Lacombe on remanding the cause from the Supreme Court of the United States to the Supreme Court of the State of New York: "The propriety of the removal is to be tested by the bill, not by the individual defenses to it. In a suit to foreclose a mortgage the original mortgage debtor and the subsequent purchaser of the property are both necessary parties, and the controversy is not separable (Ayers *vs.* Wiswell, 112 U. S., 187). As Adams, the subsequent purchaser, is a citizen of the same State as the complainant, the cause must be remanded. E. J. L."

Adams was not a necessary party to the action, as he had no interest whatever in it. The cause was therefore severable. The defendant in error could have brought an action upon the bond itself against the plaintiff in error.

On the foreclosure of the mortgage Adams was not a necessary party, and the joining of Adams in the case would not prevent the plaintiff in error from removing it.

Point II.

The writ of error in this case was allowed on the 27th day of March last, returnable within 30 days. Plaintiff in error is entitled to all that time to file the record in the Supreme Court. The defendant in error has made a motion to dismiss the writ of error, returnable on the 17th inst., several days prior to the return mentioned in the writ of error, and has brought into the Court a return and a record which is not complete; it does not contain the assignment of errors nor the petition and papers filed in the Supreme Court on the motion to remove the cause. Rule 8 requires, among other things, a certificate that the annexed papers are a true copy of the record, and of the assignment of errors, and of all proceedings in the case.

The petition for removal, when presented to the State Court, becomes part of the record of that Court. If upon the face of the petition and of the whole record of the State Court sufficient grounds for a removal are shown, the petition may be amended in the Circuit Court of the United States, by leave of that Court, by citing more fully and distinctly the facts which support these grounds.

Powers *vs.* Chesapeak, &c., R. R., 169 U. S., 101.

Point III.

The right of the plaintiff in error in this case to review in this Court on the writ of error or appeal the question of jurisdiction alone is clear, and to

review that question is the object of the writ of error in the present case.

169 U. S., 101, and cases cited.

Under the old law the pleadings only were looked at, and the rights in respect to a removal were determined solely according to the position they occupied as plaintiff and defendant in the suit. Under the new law the mere form of the pleadings may be put aside, and the parties placed on different sides of the matter according to facts.

100 U. S., 469.

Point IV.

There are numerous cases reported in the United States Reports where writ of errors have been dismissed, in which the plaintiff in error sought to review the question of the jurisdiction of the Circuit Court upon a remand, prior to a final judgment; the writs of errors have repeatedly been dismissed upon that ground alone.

Case of McLish *vs.* Roff, 141 U. S., 661. The writ of error in this case was dismissed upon the ground that it could be only taken after final judgment. It was therein sought to review the jurisdiction of the Circuit Court. The writ of error was taken under Act of March 3d, 1891, claiming that the only question and issue was the jurisdiction of the Court. The Court at page 668 says: "the true purpose of the act, as gathered from its context, is that the writ of error or appeal may be taken only after final judgment, except in the case specified in Section 7 of the act. * * * When

that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction, or to the Circuit Court of Appeals upon the whole case ; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this Court. Chicago, St. Paul, &c. R. R. *vs.* Roberts. In this case the case last cited was affirmed and followed.

The plaintiff in error does not question the doctrine that a writ of error or appeal cannot be taken from interlocutory orders, or decisions, or judgments, not final, but must wait until the final decision in the case. But that at some time, and that time must be after the final decision and determination of the cause, the plaintiff in error may review the question of the jurisdiction of the Court in any case in which the jurisdiction of the Court is in issue.

Point V.

The defendant in error in his points has stated substantially that the Supreme Court cannot review the order of the Circuit Court remanding a case to the State Court. I have examined the decisions that he cites, and find that the rule is not as stated by the counsel for defendant in error. The rule is that the order cannot be reviewed until after final judgment.

Point VI.

The counsel for defendant in error has stated in

his brief that there is no federal question involved in this appeal. I have examined the cases cited by him and they do not apply. There is a federal question presented upon the record, when the record is complete, in which the jurisdiction of the State Court is challenged. The State Court was ousted of its jurisdiction. When the plaintiff in error complied with the law of the United States in reference to removal of cases it was error in the State Court to proceed to the trial of the case, as it was without jurisdiction. The case of R. R. Co. *vs.* Koontz the Court says: "We have uniformly held that if the State Court wrongfully refuses to give up its jurisdiction upon petition for removal, and forces a party to trial, he loses none of his rights by remaining and contesting the case on its merits. It is also a well settled rule of decision in this Court that when a sufficient cause for removal is made in a State Court, the rightful jurisdiction of that Court comes to an end, and no further proceedings can properly be had there, unless in some form its jurisdiction is restored."

It has been held in repeated cases, as I understand, that the parties by consent cannot confer jurisdiction upon the Court if the Court is otherwise without jurisdiction. The Circuit Court is without power to confer jurisdiction upon the State Court after the State Court has once lost that jurisdiction.

103 U. S., 481-492; 606.
104 U. S., 5.
19 Wall, 214.

Point VII.

The remand order, filed in the State Court, draws

with it the papers upon which it is based, and a question of the jurisdiction of both the Circuit Court and the State Court is subject to reviewal. As before stated, the plaintiff in error has preserved his right to raise the question of jurisdiction, now that final judgment in the action has been rendered. If the record brought down by the defendant in error is not the complete record, as it seems not to be, the plaintiff in error should not suffer for that. The rule in this Court provided that the plaintiff in error may docket the case and file the record on or before the return day. For failure the defendant in error may do so. If the defendant in error files a transcript or dockets the case before the time has expired, and subsequently the plaintiff in error files the transcript and dockets the case in due time, defendant's docket will be dismissed.

113 U. S., 687.

Point VIII.

The plaintiff in error raises the objection which is apparent on inspection of the record returned by the defendant in error, that the record as returned by defendant in error does not contain the assignment of errors filed by plaintiff in error, nor does it contain the petition and bond filed by plaintiff in error in the Supreme Court of the State of New York for the removal of the cause from the State to the Circuit Court of the United States nor the proceedings in the Circuit Court of the United States on the motion to remand, nor any order remanding the cause to the State Court.

Plaintiff in error contends that the present motion cannot properly be heard without prejudice to the rights of the plaintiff in error until the said record brought down by the defendant in error is corrected and he prays for leave to have such record amended and for permission to add to the record the properly authenticated papers in that behalf which the plaintiff in error has brought down and filed with the Clerk of this Court.

Point IX.

Plaintiff in error raised the question of jurisdiction in the State Court by filing his petition for removal with necessary bond. The State Court lost jurisdiction and the trial of the action subsequently raised a federal question as to the jurisdiction of the Court, cases cited on this brief. The Federal Court has sustained the defense as to the invalidity of the bond and mortgages in 110 U. S., p. 729.

The motion to dismiss should be denied.

Respectfully submitted,

Wm H. Newman,
Counsel for
Plaintiff in Error